Supreme Court, U. S.
FILED
JUL 20 1979
MICHAEL RODAK, JR., CLERK

No. 78-1783

In the Supreme Court of the United States

OCTOBER TERM, 1978

NORMAN R. SIMONS AND CATHERINE SIMONS,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1783

NORMAN R. SIMONS AND CATHERINE SIMONS,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET. AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of the decision below holding nonappealable an order dismissing their motion to compel the return of property turned over to the Internal Revenue Service by petitioners' employer and to suppress the use of this material as evidence against petitioners in any criminal proceedings.

The pertinent facts may be summarized as follows: In August 1977, the Internal Revenue Service was conducting an audit of petitioners' civil tax liability and investigating possible criminal violations. In compliance with an Internal Revenue Service summons, petitioner Norman R. Simons' employer, Southwest Drywall, voluntarily turned over certain of its records pertaining to petitioner's employment. Although the Internal Revenue

Service sent petitioners notice of the summons by certified mail, petitioners refused to pick up their mail and never attempted to intervene in the summons proceeding. Thereafter, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, petitioners filed a motion in the United States District Court for the Southern District of Texas seeking the return of the records and the suppression of their use as evidence in any criminal proceeding against petitioners (Pet. App. 28). After an evidentiary hearing, the district court found the summons to have been validly issued and denied petitioners' motion (Pet. App. 23-24). The court of appeals dismissed the appeal for lack of jurisdiction (Pet. App. 29).

1. Petitioners first contend (Pet. 6-8) that the court of appeals' failure to set their case for oral argument denied them their Sixth Amendment right to counsel. But the court of appeals placed this case upon the summary calendar to be decided without oral argument only after the observance of a careful procedure designed to safeguard procedural due process. See *George W.B. Bryson & Co.* v. *Norton Lilly & Co.*, 502 F. 2d 1045, 1051 (5th Cir. 1974).[1] There is no constitutional impediment in such a procedure. Apart from the fact that the Sixth Amendment is applicable only to criminal prosecutions (see, *e.g.*, *Brewer* v. *Williams*, 430 U.S. 387, 398 (1977)), there is no constitutional requirement that oral argument be heard in every case in the courts of appeals. *Communications Comm'n* v. *WJR*, 337 U.S. 265, 274-277 (1949). See also *Taylor* v. *McKeithen*, 407 U.S. 191, 194 n.4 (1972).

---

[1]Although petitioners represent (Pet. 6) that both parties specifically requested oral argument, the government did not in fact request such argument. In compliance with Local Rule 13 of the court of appeals, the government informed the court that oral argument "may be helpful" (Appellee's Br. i).

2. Petitioners further argue (Pet. 9-10) that the court of appeals erred in dismissing their appeal for lack of subject matter jurisdiction. But the court correctly recognized that under the standard set forth in *DiBella* v. *United States*, 369 U.S. 121 (1962), an order granting or denying a pre-indictment motion to suppress is not a final appealable order. Hence, the denial of a motion made pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure is appealable only if the motion is solely for the return of property and is in no way tied to a criminal prosecution *in esse*. (*Id.* at 131-132). The question whether a motion is one solely for the return of property is to be resolved by examining its "essential character and the circumstances under which it is made." *Cogen* v. *United States*, 278 U.S. 221, 225 (1929); *United States* v. *Premises Known as 608 Taylor Ave.*, 584 F. 2d 1297 (3d Cir. 1978). Thus, where the property in issue belongs to the movant who seeks the return of the property, the courts of appeals have exercised their jurisdiction to review the denial of such motions. See, *e.g.*, *Mr. Lucky Messenger Service, Inc.* v. *United States*, 587 F. 2d 175 (7th Cir. 1978); *United States* v. *Premises Known as 608 Taylor Ave., supra*; *Richey* v. *Smith*, 515 F. 2d 1239 (5th Cir. 1975); *Gottone* v. *United States*, 345 F. 2d 165 (10th Cir.), cert. denied, 382 U.S. 901 (1965); *Coury* v. *United States*, 426 F. 2d 1354 (6th Cir. 1970).

But here, petitioners have no property interest in the materials they seek to have "returned." The records in question belong to Southwest Drywall. Hence, the essential character of petitioners' motion was only for the suppression of the use of the materials in any future criminal proceeding (Pet. App. 29). The district court's denial of such a motion was not a final order and was

therefore not appealable under *DiBella*.[2] See also *G.M. Leasing Corp.* v. *United States*, 429 U.S. 338, 359 (1977). The court of appeals therefore correctly dismissed the appeal for lack of jurisdiction.

At all events, the summons of the records of petitioner's employer relating to his employment was entirely proper. See *Donaldson* v. *United States*, 400 U.S. 517 (1971); *United States* v. *Miller*, 425 U.S. 435 (1976)).

It is therefore respectfully summitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

JULY 1979

---

[2]For this reason, contrary to petitioners' assertion (Pet. 9), there is no conflict between the result reached in this case and *Gottone* v. *United States*, *supra*. Both the Fifth and Tenth Circuits recognize that, in the absence of criminal proceedings, the denial of a motion for the return of seized property is subject to appellate review. *Mr. Lucky Messenger Service, Inc.* v. *United States*, *supra*; *Gottone* v. *United States*, *supra*.

DOJ-1979-07